



REPUBLIC OF KENYA



KENYA LAW
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**Makokha v Republic (Criminal Appeal E033 of 2025)
[2025] KEHC 8425 (KLR) (17 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E033 OF 2025
DR KAVEDZA, J
JUNE 17, 2025**

BETWEEN

BRIAN WAKHUNGU MAKOKHA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 17th February 2025 by Hon. M. Murage (PM) at Kibera Chief Magistrate's Court Sexual Offences Case No. E133 of 2022 Republic v Brian Wakhungu Makokha)

JUDGMENT

1. The appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 15th December 2022 at [Particulars withheld] Area in [Particulars withheld] Sub-County within Nairobi County, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of WO a child aged 14 years. He was sentenced to serve twenty (20) years imprisonment.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence imposed.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. PW2, the Complainant, WO, testified that she was born on 23 January 2008. On the date of the incident, at approximately 6:30 AM, she encountered the appellant, who took her by the hand and



forcibly brought her into his residence. There, he covered her mouth with his hand, forced her onto a mattress, and threatened to kill her if she did not comply. He then engaged in sexual intercourse with her.

5. After the incident, the appellant instructed PW2 to leave. She stated that his contact details were stored in her mother's phone. PW2 did not disclose the incident immediately due to the appellant's threats. In court, she identified the appellant, confirming she had known him for one month prior and that they were in a romantic relationship but he had forced her to have sex with him.
6. PW1, MM, a domestic worker and the complainant's mother, testified that on 15 December 2022, while selling mandazi by the roadside in Kangemi, the appellant purchased mandazi worth KES 20, paying two days later via M-Pesa. She noticed his number appeared in her other phone, linked to a message expressing his intent to marry her daughter. PW1 reported the matter to the local chief, where PW2 disclosed that the appellant would call her, lock her in his house, and engage in sexual intercourse with her. PW1 knew the appellant as "Max" and denied any conspiracy to falsely accuse him.
7. PW3, John Njuguna, a medical examiner, testified that PW2 was examined at Nairobi Women's Hospital on 22 December 2022. The complainant, a minor, reported a history of defilement by a known neighbour. She appeared distressed during the examination. No physical injuries were observed, and her genitals showed no recent trauma, though her hymen was broken and healed. PW3 produced the Post-Rape Care (PRC) form as Exhibit 2, the P3 form as Exhibit 5, and the laboratory report as Exhibit 4.
8. PW4, PC Benson Nyeri, the investigating officer, testified that on 21 December 2022, PW2, accompanied by her mother, reported the incident. Statements were recorded, and the appellant was arrested and charged. PW4 produced PW2's birth certificate as evidence.
9. In his defence, the appellant testified that on 20 December 2022, he was selling Safaricom lines at the Kangemi stage when two individuals apprehended him and took him to Kangemi Police Station, where he was informed of the defilement allegation. He admitted to knowing PW2 and being a customer at her mother's mandazi kiosk but denied any sexual contact. He noted that the alleged message about marriage was not produced in court and claimed he was falsely accused, though he could not explain the motive.
10. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them.
11. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under Section 2 of the Act means,

"the partial or complete insertion of the genital organs of a person into the genital organs of another person."
12. Further, section 8(1) and (3) of the [Sexual Offences Act](#), No. 3 of 2006 provides thus:
 8. Defilement
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.



13. The complainant, PW2, testified that she was born on 23 January 2008, establishing her age as 14 years at the time the offence was committed on 21 December 2022. This was corroborated by her mother, PW1, and substantiated by the birth certificate produced by PW4, the investigating officer, as Exhibit 4. The complainant's age, falling within the 12-to-15-year bracket under Section 8(3) of the *Sexual Offences Act*, was conclusively proved, confirming her status as a child within the meaning of the *Act*.
14. On the ingredient of penetration, PW2 provided a clear and detailed account of the incident, stating that on the material date at approximately 6:30 AM, the appellant forcibly took her into his residence, covered her mouth, pushed her onto a mattress, threatened her life if she did not comply, and engaged in sexual intercourse with her. She further affirmed that she had been in a romantic relationship with the appellant. Penetration, as defined under Section 2 of the *Sexual Offences Act*, was established beyond reasonable doubt.
15. The testimony of PW2 was supported by medical evidence from PW3, the medical examiner, who examined the complainant on 22 December 2022 at Nairobi Women's Hospital. Although no external injuries were observed, PW3 confirmed that the complainant's hymen was broken and healed, consistent with prior sexual activity as described by PW2. The Post-Rape Care (PRC), P3 Form, and laboratory report further corroborated the occurrence of penetration.
16. The identification of the appellant as the perpetrator was direct and unequivocal. PW2 identified the appellant in court, stating she had known him for approximately one month before the incident and that they were in a romantic relationship. She further confirmed saving his contact details in her mother's phone. It was therefore not a case of mistaken identity.
17. PW1, the complainant's mother, provided additional evidence, testifying that she discovered a message from the appellant on her phone indicating his intent to marry her daughter. This prompted PW1 to confront PW2 and report the matter to the local chief. PW2 identified the appellant as "Max" and confirmed prior interactions, eliminating any possibility of mistaken identity. The appellant, in his defence, admitted to knowing PW2 and her mother, though he denied the allegations. His defence that he was framed did not dislodge the otherwise consistent prosecution's case.
18. The prosecution presented consistent and corroborated evidence establishing the three essential elements of defilement: the complainant's status as a minor, the occurrence of penetration, and the positive identification of the appellant as the perpetrator. The evidence was credible, uncontroverted, and sufficient to uphold the charge. The conviction of the appellant for the offence of defilement under Section 8(3) of the *Sexual Offences Act* is hereby affirmed.
19. On sentence, the appellant was sentenced to serve twenty (20) years imprisonment. During sentencing, the court considered the pre-sentence report and exercised discretion. In the premises, I see no reason to interfere with the sentence.
20. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 17TH DAY OF JUNE 2025

D. KAVEDZA

JUDGE

In the presence of:-

Appellant Present



Odhiambo for the Appellant

Mutuma for the Respondent

Tonny Court Assistant

